



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 4, 1995

Mr. Carl Mullen
Acting Executive Director
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR95-1351

Dear Mr. Mullen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36328.

The General Services Commission (the "commission") received an open records request for information relating to a disciplinary action taken against an employee of the commission. You seek to withhold three internal memoranda and assert that section 552.111 of the Government Code excepts this information from required public disclosure. You also seek to withhold a transcript of a recorded conversation relating to this matter and assert that section 552.101 of the Government Code excepts this information from required public disclosure.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). This section does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5. Most of the information that you submitted for review is purely factual. This factual information may not be withheld under this exception.

Additionally, section 552.111 only protects advice, recommendations and opinions relating to the *policymaking* functions of an agency. *Id.* You state that the information you seek to withhold concerns the commission's policy against discrimination and racism in the workplace and the commission's policy regarding weapons in the workplace. In Open Records Decision No. 631 (1995), this office held that section 552.111 excepted from disclosure portions of a report concerning allegations of systematic discrimination in faculty employment at a university. While internal administrative and personnel matters are not protected under section 552.111, this office found that the scope of the report at issue in Open Records Decision No. 631 (1995) was much broader and involved the university's educational mission relating to affirmative action and meeting the needs of a diverse student body. Although the documents you have submitted relate to incidents raising racial concerns, the information generally relates to a specific personnel matter and is not of a broader nature relating to the commission's policy mission. Thus, this information may not be withheld under section 552.111. We have marked a small portion of information, however, which relates to the commission's broader policies relating to racism. This information may be withheld under section 552.111.

You also assert that a transcript of a recorded conversation may be withheld under section 552.101. You point out that one of the parties to the conversation promised another party to the conversation that the tape recording would only be heard by supervisory personnel within the commission and would not be generally released. Thus, you assert that the individual has a privacy interest in the transcript.

Section 552.101 protects information made confidential by either common-law privacy or constitutional privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in independence in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. The second interest in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law;

the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

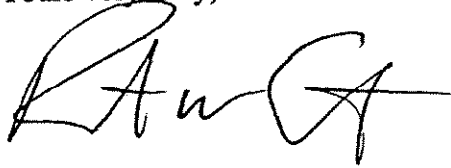
We do not believe that the information contained in the telephone transcript is protected under either common-law or constitutional privacy. The information is not protected by common-law privacy because the information concerns work-related matters and is not of a highly intimate or embarrassing nature. Moreover, information relating to a government employee's job performance is of legitimate public interest. Open Records Decision Nos. 470 (1987), 464 (1987). The information is also not protected by constitutional privacy because it does not fall within one of the constitutionally recognized "zones of privacy," nor does it concern an intimate aspect of human affairs. Although one of the participants in the conversation appears to have been promised that the conversation would be kept confidential, this does not make the information confidential. Governmental bodies and their employees may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 444 (1986), 437 (1986), 425 (1984), 414 (1983). Nor is information confidential under the Open Records Act simply because the party submitting it anticipates or requests that the information be kept confidential. Open Records Decision No. 479 (1987); cf. Open Records Decision No. 169 (1977) (information may be withheld under "special circumstances" where there is demonstration of imminent threat of physical danger as opposed to generalized, speculative fear of harassment or retribution).¹

Finally, we note that one of the internal memoranda submitted for our review include the home address and home telephone number of commission employees. Sections 552.117 and 552.024 of the Government Code protect from public access both current and former home addresses and home telephone numbers of governmental employees who have chosen to keep this information private. Open Records Decision No. 622 (1994) at 5-6. You must withhold the home addresses and home telephone numbers of employees who, as of the time of the request for this information, had elected to keep the information private. Open Records Decision Nos. 530 (1989) at 5. We have marked the information that is at issue.

¹You state in your letter to our office that one of the participants in the conversation "is concerned about his [sic] safety and the safety of his [sic] property." Although our office has previously found that information may be withheld in "truly exceptional circumstances" where there is an imminent threat of physical danger, information may not be withheld where there is merely a generalized or speculative fear of harassment or retribution. Open Records Decision No. 169 (1977) at 6. You have not demonstrated special circumstances that would allow the transcript of the conversation to be withheld in this instance. Although the Open Records Act does not authorize you to withhold the transcript, we note that you are free to notify the participants in the conversation of the request for this information. The commission or the participants of the conversation may wish to take other appropriate actions in response to the release of this information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS', with a long horizontal line extending to the right.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/rho

Ref.: ID# 36328

Enclosures: Marked documents

cc: Mr. Robert Martinez
(w/o enclosures)
